PERAK INDUSTRIAL CORPORATION SDN BHD & ORS v. TAN BOON LEE

HIGH COURT MALAYA, IPOH
SM KOMATHY JC
[CIVIL SUIT NO: 24NCVC-230-05-2014]
7 APRIL 2015

ADMINISTRATIVE LAW: *Remedies – Declaration – Application to declare defendant a vexatious litigant – Whether defendant habitually and persistently without reasonable ground instituted vexatious proceedings against plaintiffs – Whether defendant's cause of action was without merit – Whether defendant should be declared a vexatious litigant – Courts of Judicature Act 1964, s. 25(2)*

The second plaintiff and the defendant were brothers who formed a partnership called Fatt Lee Fong Enterprise to venture into timber logging contracts and saw milling. The second plaintiff and the defendant, subsequently purchased the entire shareholding of the first plaintiff which owned approximately 3,000 acres of timber concession. Over the years, the business undertaken by the brothers prospered and expanded. However, the relationship between the brothers became acrimonies after a dispute in respect of defendant's suggestion to purchase a timber concession that he had identified at the cost of RM4 million. The second plaintiff informed the defendant that there were insufficient funds to undertake the investment. The defendant did not believe the second plaintiff and thereupon informed him of his intention to exit the company. The defendant alleged that the second plaintiff had dissolved Fatt Lee Fong Enterprise without notice to him and wrongfully diluted his shareholding in the first plaintiff and also fraudulently secured his signature on a letter of resignation as director in the first plaintiff. Whereupon, the defendant initiated three legal proceedings against the plaintiff which were subsequently either withdrawn or dismissed. The proceedings were (i) Ipoh High Court Winding Up petition ('2011 petition'); (ii) Ipoh High Court Civil Suit ('2011 civil suit'); and (iii) Ipoh High Court Winding Up Petition ('2013 petition'). The plaintiffs applied and succeeded in striking out the 2011 petition on the ground of multiplicity of proceedings as it was based on similar or substantially similar grounds as the 2011 civil suit. When the defendant sought to proceed with the 2011 civil suit, the plaintiffs applied to strike out the 2011 civil suit on the ground that there was non-compliance with O. 18 r. 12 of the Rules of the High Court 1980. The plaintiff's application was dismissed and the court ruled that there was merit in the defendant's cause of action. The plaintiffs also applied to strike out the 2013 petition on the grounds of *res judicata* and multiplicity of proceedings. However, the defendant withdrew the 2013 petition subject to the condition of the court that no further petition was to be filed based on the same facts. The defendant then sought leave of the court to discontinue the 2011 civil suit as well. Again, the plaintiffs took the position that the discontinuance

should only be permitted if the same was withdrawn without liberty to bring another action. The plaintiffs then filed the present originating summons under s. 25(2) read together with para. 17 of the Schedule of the Courts of Judicature Act 1964 ('CJA') for an order to declare that the defendant was a vexatious litigant and a restraint order to prohibit him from instituting any legal proceedings in any court against them without obtaining the prior leave of the court. The issue that arose for the court's determination was whether the defendant had habitually and persistently, without any reasonable ground, instituted vexatious proceedings and made vexatious applications in these proceedings against the plaintiffs.

Held (dismissing plaintiff's application with costs):

(1) Although the defendant had initiated three proceedings against the plaintiffs on the same subject matter, it was insufficient for the court to declare him a vexatious litigant who had habitually and persistently initiated proceedings and applications which had no prospect of success. The 2011 petition and the 2013 petition were dismissed on the ground of multiplicity of proceedings and not because they were without merit. Therefore, the litigation which the defendant had commenced could not properly be described as having been instituted habitually and persistently. (paras 31 & 32)

(2) Vexatious proceedings are proceedings which have little or no basis in law, or at least no discernible basis. The initiation of the proceedings was to subject a defendant to inconvenience, harassment and expense out. On the facts, this was plainly not a case in which there was no discernible basis in law for the defendant's claims. The three proceedings alleged causes of action were recognised by the law, namely misappropriation and misconduct in the management of the first plaintiff and Fatt Lee Fong Enterprise. (para 34)

(3) When the defendant sought to withdraw the 2011 civil suit, the plaintiffs had argued that discontinuance should be allowed on condition that the defendant be prevented from filing further action on the same facts. A perusal of the order indicated that discontinuance was allowed with liberty. If the court had been minded to allow the discontinuance without liberty, this would have been expressed in the order. (paras 35 & 36)

(4) A discontinuance without liberty would effectively prevent the defendant from initiating any action against the plaintiffs based on the facts in the 2011 civil suit. By allowing discontinuance with liberty, the court accepted that the defendant's claim was not vexatious and it was instituted with reasonable grounds. In the circumstance, the plaintiffs contention that the defendant had the propensity or history of habitually and persistently initiating vexatious proceedings against them was untenable. (paras 36 & 37)

Case(s) referred to:

American Express (M) Sdn Bhd v. Matthias Chang Wen Chieh [2012] 5 CLJ 794 HC ***(refd)***

R (Kumar) v. Secretary of State for Constitutional Affairs [2006] EWCA Civ 990, [2007] 1 WLR 536 ***(refd)***

Sim Kooi Soon v. Malaysia Airline System (No. 2) [2010] 9 CLJ 936 CA ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 25(2)

Rules of the High Court 1980, O. 18 r. 12

For the plaintiffs - Su Tiang Joo (Nasema Jalaludheen with him); M/s Cheah Teh & Su
For the defendant - Yusof Zainal Abideen (Wong Chiang Kiat & Lim Kon Keen with him); M/s Seow & Megat

Reported by Sandra Gabriel

JUDGMENT

SM Komathy JC:

Introduction

[1] The plaintiffs had to defend themselves in three separate legal proceedings brought against them by the defendant. This led to the filing of the present originating summons under s. 25(2) read together with para. 17 of the Schedule of the Courts of Judicature Act 1964 ("CJA") for an order to declare the defendant a vexatious litigant and a restraint order to prohibit him from instituting any legal proceedings in any court against them without obtaining the prior leave of the court.

[2] The application is premised on two grounds. First, the three legal proceedings initiated by the defendant against the plaintiffs that were subsequently either withdrawn or dismissed. These proceedings were (a) Ipoh High Court Winding Up petition No. 28NCVC-23-2011 ("2011 petition") (b) Ipoh High Court Civil Suit No. 22NCVC-83-2011 ("2011 civil suit") and (c) Ipoh High Court Winding Up Petition No. 28-53-09-2013 ("2013 petition"). Second, the numerous interlocutory applications filed by the defendant in the three proceedings.

The Parties

[3] The second plaintiff is the elder brother of the defendant. The third and fourth plaintiffs are the second plaintiff's sons and the directors in the first plaintiff company, Perak Industrial Corporation Sdn Bhd. The plaintiffs and defendant are shareholders in the first plaintiff company.

The Facts

[4] In 1982, the second plaintiff and the defendant formed a partnership called Fatt Lee Fong Enterprise, to venture into timber logging contracts and saw milling. Sometime in 1995 or 1996, with the profits generated from the

partnership business, the second plaintiff and the defendant, with a view to expand the business, purchased the entire shareholding of the first plaintiff which owned approximately 3000 acres of timber concession.

[5] Over the years, the business undertaken by the brothers prospered and expanded, and they acquired hundreds of other companies possessing timber concessions.

[6] However, trouble arose between the brothers in or around October 2010, when the defendant suggested to the second plaintiff that they should purchase a timber concession that he had identified at the cost of RM4 million. The second plaintiff informed the defendant that the first plaintiff company and the other companies jointly owned by them did not have sufficient funds to undertake the investment. The defendant did not believe his brother and thereupon informed him of his intention to exit the company. The relationship between the parties became acrimonies not long thereafter.

[7] The defendant alleged that the second plaintiff had dissolved Fatt Lee Fong Enterprise without notice to him and wrongfully diluted his shareholding in the first plaintiff and also fraudulently secured his signature on a letter of resignation as director in the first plaintiff. Whereupon, on 7 April 2011, the defendant filed the 2011 petition and, two weeks later, the 2011 civil suit against the first to the fourth plaintiffs. These proceedings were essentially predicated on the allegation that he was illiterate and that the second plaintiff had taken advantage of the trust placed by him on the plaintiffs to run the business fairly and equitably.

[8] Thereafter, the plaintiffs applied and succeeded in striking out the 2011 petition on the ground of multiplicity of proceedings as it was based on similar or substantially similar grounds as the 2011 civil suit. The defendant unsuccessfully appealed to the Court of Appeal.

[9] The defendant then sought to proceed with the 2011 suit. On 25 April 2011, the plaintiffs applied to strike out the said civil suit on the ground there was non compliance with O. 18 r. 12 of Rules of the High Court 1980 and that the reliefs sought would affect persons who were not made parties in the proceedings. The application was dismissed and the court ruled that there was merit in the cause of action and gave the defendant leave to amend the statement of claim with liberty to add new causes of action and add new parties consistent with the reliefs sought. The defendant then filed the application to amend the statement of claim to add forgery as a cause of action.

[10] On 18 September 2013, the defendant instituted the 2013 petition. The plaintiffs again applied to strike it out on the grounds of *res judicata* and multiplicity of proceedings. The defendant responded by withdrawing the petition on 28 January 2014. The court permitted the withdrawal subject to the condition that no further petition was to be filed based on the same facts.

[11] Not long thereafter, on 17 March 2014, the defendant sought leave of the court to discontinue the 2011 civil suit as well. Again, the plaintiffs took the position that the discontinuance should only be permitted if the same was withdrawn without liberty to bring another action. The court permitted the discontinuance of the 2011 civil suit. There is a dispute between the parties as to whether the discontinuance was with or without liberty.

[12] The defendant had stated in terms of his intention to issue a further claim against the plaintiffs after he has reformulated his claim in the light of the new evidence. In May 2014, the plaintiffs filed the present originating summons. The plaintiffs seek the order on the basis of the defendant's conduct to date, and state that there is a real risk that this claim too will be totally without merit.

Contentions Of Parties

[13] The main thrust of the plaintiffs' contention was that the defendant has a history of commencing vexatious legal proceedings and withdrawing the same with the intention of subjecting them to inconvenience, harassment and expense. The three legal proceedings commenced by the defendant were similar or substantially and/or related to similar issues and/or arising from the same facts or complaints and/or allegations. The substratum of all the three legal proceedings was the alleged misconduct in the affairs of Fatt Lee Fong Enterprise and the first plaintiff. The issues regarding the alleged misconduct could have been determined by a single action instead of three set of legal proceedings with its attendant inconveniences, hardship and legal costs to the plaintiffs.

[14] The plaintiff contended that the conduct of the defendant demonstrated that he was committed to bringing claims without any genuine belief in them, but rather to harass the plaintiffs. If indeed the 2011 civil suit and 2013 petition were sound and meritorious on the facts and the law, the withdrawal of the same before it could be adjudicated indicated otherwise.

[15] The plaintiffs also relied on the conduct of the defendant in opposing a validation application made by them in the 2011 petition. The validation application had been sought to pay the salaries of the employees and to meet its tax obligations, but the defendant had opposed the application and had sought the appointment of a provisional liquidator claiming that the first plaintiff's assets would be dissipated and/or misused by the other plaintiffs if a validation order was granted. The court rejected the argument and granted the validation order and refused the appointment of a provisional liquidator.

[16] Lastly, the plaintiffs relied on the numerous applications made by the defendant in the 2011 civil suit and 2013 petition. In these proceedings, he had applied for, among others, an injunction to restrain the plaintiffs and six other persons from dealing with the machineries of the first plaintiff, a

mandatory injunction for the delivery of the first plaintiff's machineries to the defendant's workshop, an injunction to restrain dealings in the shares of the first plaintiff, and an injunction to restrain any dealings with the Forestry Department in relation to timber concessions. The defendant, however, did not proceed with all these applications save and except the application to restrain the plaintiffs from dealing with the shares of the first plaintiff. The said application was heard and dismissed. The decision of the trial judge was affirmed by the Court of Appeal. Based on these facts, the plaintiff contended it was clear that these applications were filed only to harass and inconvenience them.

[17] The defendant vigorously resisted the application. He denied that the three legal proceedings had been brought to harass and inconvenience the plaintiffs and had no legal basis. On the contrary, he argued that the proceedings had been brought to seek redress for the wrong done to him by the plaintiffs.

[18] The defendant, however, conceded that there was multiplicity of proceedings when he filed the 2011 petition and 2011 civil suit simultaneously. He further conceded that the 2011 petition was correctly struck off by the court premised on this ground.

[19] The defendant also conceded that the 2013 petition overlapped with the 2011 civil suit. He also accepted that as the court had permitted the withdrawal of the 2013 petition without liberty, he was precluded from filing further petitions on the same cause of action. His only recourse was to pursue to claim what was due to him by a civil suit.

[20] As for the 2011 civil suit, the defendant pointed out that the plaintiffs application to strike out the 2011 civil suit was made on the ground there was non compliance with O. 18 r. 12 Rules of the High Court 2012 and not because it was a vexatious claim. The striking out application was dismissed, and in doing so, the court had observed that there was merit in the defendant's cause of action and gave him leave to amend the statement of claim with liberty to add new causes of action and new parties consistent with the reliefs sought. The dismissal of the striking out application, it was contended, negated the claim by plaintiffs that the 2011 suit was vexatious. The plaintiffs were estopped form pursuing the present application on the basis that was no merit in this 2011 civil suit in view of their withdrawal of their appeal against the dismissal of their application to the Court of Appeal.

[21] The defendant strongly disputed that he had withdrawn the 2011 suit because it had no chance of success. The withdrawal, he contended, was because the case had become complicated when new evidence had surfaced which required further amendment of the writ and statement of claim. To avoid, extensive amendments to his pleadings, he had applied to withdraw the action and the court had allowed it with liberty. The defendant contended

that the fact that in August 2012, the second and third plaintiffs were charged for criminal breach of trust and abetment, respectively, provided crucial support to his contention that his cause of action in the three legal proceedings was not without basis.

[22] On the interlocutory applications, the defendant contended that he was not the only party who had filed these applications in the three proceedings. The plaintiffs had similarly filed various interlocutory applications of their own. The decisions in these applications had gone both ways. In the premises, there was no basis for the plaintiffs to mount a contention that these applications had been made without any legal basis and to harass them.

The Applicable Legal Principles

[23] Paragraph 17 of the schedule to CJA reads:

> Power to restrain any person who has habitually and persistently and without reasonable cause instituted vexatious legal proceedings in any court, whether against the same or different persons, from instituting any legal proceedings in any court save by leave of a Judge. A copy of any such order shall be published in the *Gazette*.

[24] Paragraph 17 affords clear statutory power for the court to declare a litigant a vexatious litigant and to grant a restraint order where certain conditions are satisfied. The rationale for making an order under para. 17 is to protect the public against the expense and inconvenience involved in responding to claims that have no factual or legal foundation and also to reduce or minimise the judicial time spent by courts in dealing with persistent and ill founded claims made without any legal or factual basis.

[25] There is a long line of decided cases that makes it quite clear that, so long as the right of access to the court is not extinguished, a court is entitled to regulate its affairs so as to protect its process and the interests of other parties against whom vexatious litigation is habitually and persistently brought.

[26] The characteristics of vexatious proceedings are well-established. They are set out by Abdul Malik Ishak JCA in *Sim Kooi Soon v. Malaysia Airline System (No. 2)* [2010] 9 CLJ 936; [2011] 4 MLJ. His Lordship enunciated:

> What is the hallmark of a vexatious litigant? The claimant who sues the same party repeatedly in reliance on essentially the same cause of action, perhaps with minor variations, is termed as a vexatious litigant.
>
> And a vexatious proceeding is one where the vexatious litigant had little or no basis in law and its effect was to subject the opposing party to inconvenience.

[27] In *American Express (M) Sdn Bhd v. Matthias Chang Wen Chieh* [2012] 5 CLJ 794; [2012] 7 MLJ 489, the court was asked to declare the defendant a vexatious litigant. In allowing the application, Prasad Abraham J (as he then was) observed (at 491):

> In determining this question the court will have to look at the whole sequence of litigation initiated by the defendant to see whether the defendant fell within the barometers of the said Act bearing in mind, the order being sought is rather draconian in its effects and should be exercised sparingly (see *Re Vernazza* [1959] 2 All ER 200) particularly at p. 202 of the report where it was held:
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> > In determining whether proceedings were vexatious the court must look at the whole history of the matter, not solely at the question whether the pleadings had throughout disclosed a cause of action, and in the present case, so regarded, the order should be granted.

[28] The authorities illustrate that vexatious litigation concern repeated claims or applications in respect of one particular matter by which the litigant has become obsessed, commonly involving the same defendant or defendants. The real vice is the initiation or launching of proceedings that are ill founded and have no reasonable prospect of success. The court has a discretion under para. 17, whether to make an order upon the fulfilment of the statutory preconditions. The exercise of the discretion will depend on its assessment of where the interests of justice lie, taking into account on the one hand a citizen's right to initiate action in court and on the other the need to provide prospective defendants with a measure of protection against abusive and ill-founded claims.

[29] An order under para. 17 does not act as a barrier to any future litigation but rather as a filter for unmeritorious cases. The effect of the order is simply to prevent a defendant from instituting or continuing proceedings without first obtaining the permission of the court. If the court is satisfied that the proceedings are not an abuse of the court's process and that there are reasonable grounds for those proceedings, the court will give the defendant permission to institute or continue them.

Discussion And Decision

[30] Consequently my approach to this application against that background is as follows. Before any order can be made, I must be satisfied that the preconditions have been fulfilled, namely, that the defendant has:

(i) habitually and persistently without any reasonable ground

(ii) instituted vexatious proceedings and made vexatious applications in these proceedings against the plaintiffs.

[31] First, I turn to consider whether the defendant has habitually and persistently without reasonable cause issued claims or made applications which are totally without merit. It is true that the defendant had initiated

three proceedings against the plaintiffs on the same subject matter, but I do not consider that *per se* is sufficient for the court to declare him to be a vexatious litigant who has habitually and persistently initiated proceedings and applications which have no prospect of success. It is imperative to note that the 2011 petition and the 2013 petition were dismissed on the ground of multiplicity of proceedings and not because they were without merit.

[32] In these circumstances, I conclude that the litigation which the defendant has commenced cannot properly be described as having been instituted habitually and persistently.

[33] Next, I turn to whether the proceedings which the defendant has commenced were vexatious and were instituted by him without reasonable grounds. Vexatious proceedings were said in *Sim Kooi Soon v. Malaysia Airline System* to be proceedings which have one or more of the following hallmarks. They will have little or no basis in law, or at least no discernible basis. The initiation of the proceedings is to subject a defendant to inconvenience, harassment and expense out. And they will involve an abuse of the process of the court by the use of the process for a improper purpose.

[34] This is plainly not a case in which there is no discernible basis in law for the defendant's claims. The three proceedings allege causes of action were recognised by the law, namely misappropriation and misconduct in the management of the first plaintiff and Fatt Lee Fong Enterprise. In this connection, it is important to note the following extract in the judgment of Shamsudin Hassan JC in dismissing the striking out application made by the plaintiffs in the 2011 civil suit, where he stated:

> Setelah menyemak kertas-kertas kausa, afidavit-afidavit berkaitan serta menimbangkan hujahan peguam-peguam, Mahkamah mendapati bahawa tidak wajar untuk Mahkamah membatalkan Penyataan Tuntutan Plaintif semata-mata kerana tidak menyatakan butir-butir frod, salah representasi (misrepresentation) dan ketidaktentuan mengenai dakwaan *non est factum* serta ketidaktepatan relif-relif yang dipohon terhadap pihak-pihak yang sepatutnya.
>
> Dengan pliding yang ada, memang Mahkamah mendapati rumit dan sukar untuk pihak-pihak dan Mahkamah meneruskan perbicaraan penuh, walaupun kausa-kausa tindakan berdasarkan frod, representasi salah dan *non est factum* adalah bermerit dan tidak wajar dibatalkan begitu sahaja.

[35] Further, when the defendant sought to withdraw the 2011 civil suit, the plaintiffs had argued that discontinuance should be allowed on condition that the defendant be prevented from filing a further action on the same facts. As observed earlier, the plaintiffs took the position that the discontinuance was without liberty, and the defendant contended otherwise. In view of the conflicting positions taken, It will be helpful if I set out the order that was drawn up. It was in these terms:

A ATAS PERMOHONAN Plaintif di dalam tindakan asal melalui Notis Permohonan yang bertarikh 28.6.2013 (Lampiran 103) DAN ATAS PERMOHONAN Defendan-defendan Pertama, Ke-2 dan Ke-3 di dalam tindakan asal melalui Notis Permohonan yang bertarikh 26.12.2013 (Lampiran 137), kedua-duanya yang ditetapkan untuk bicara pada hari ini DAN ATAS PERMOHONAN lisan peguamcara Plaintif di dalam B tindakan asal, Cik Zulaikha binti Fardi, untuk menarikbalik tindakan di sini dengan kebebasan untuk memfailkan semula DAN ATAS BANTAHAN peguamcara Defendan-Defendan pertama, Ke-2 dan ke-3 mengenai kebebasan untuk memfailkan semula DAN SETELAH MENDENGAR Cik Zulaikha binti Fardi, peguamcara untuk pihak plaintif di dalam tindakan asal, Encik Teh Eng Lay (Encik Ong Ing Hou C bersamanya), peguamcara pihak Defendan-defendan Pertama, Ke-2 dan Ke-3 di dalam tindakan asal dan Encik Ahmad Shahrizl Abdul Aziz, peguamcara untuk Defendan Ke-10 di dalam tindakan asal MAKA ADALAH DIPERINTAHKAN BAHAWA tindakan plaintif di dalam tindakan asal dibatalkan dengan kos RM80,000.00 kepada Defendan-defendan Pertama, Ke-2 dan Ke-3 di dalam tindakan asal dan kos D sebanyak RM40,000.00 kepada Defendan Ke-10 di dalam tindakan asal.

[36] A perusal of the order indicates that discontinuance was allowed with liberty. If the court had been minded to allow the discontinuance without liberty, this would have been expressed in the order. Further, I am inclined E to think that the plaintiffs would not have made this application if indeed the court had ordered that discontinuance was without liberty. A discontinuance without liberty would effectively prevent the defendant from initiating any action against the plaintiffs based on the facts in the 2011 civil suit.

[37] In my judgment, clearly, by allowing discontinuance with liberty, the F court accepted that the defendant's claim was not vexatious and it was instituted with reasonable grounds. In the circumstance, the plaintiffs contention that the defendant has the propensity or history of habitually and persistently initiating vexatious proceedings against them is untenable.

[38] In *R (Kumar) v. Secretary of State for Constitutional Affairs* [2006] EWCA G Civ 990, [2007] 1 WLR 536, paras. 68-69, the Court of Appeal said, at para. 79, that:

> court staff and judges must be careful to ensure that if an application or statement of case is regarded as being totally without merit, the order of the court must record that fact, as is required by paragraph 1 of Practice H Direction C to CPR Pt 3. If this is not done, wholly avoidable expense may have to be incurred in disinterring and examining the evidence of past litigation ...

[39] It is to be noted that the practise advocated in the above *dictum* has advantages. Where an order of the court records that a claim or application I was totally without merit, it becomes unnecessary for a judge who is subsequently considering whether to make a vexatious litigant order to

re-examine that question. In the present case, the ruling of Hassan JC on the merits of the 2011 civil suit refutes the plaintiffs contention that it was a vexations claim brought without any basis.

[40] In the result I am entirely satisfied that the detailed history I have related shows that the conditions for the making of an order under para. 17 are not satisfied. I am not satisfied that the defendant has instituted vexatious proceedings and applications in the Ipoh High Court and that he has done so habitually and persistently and without any reasonable grounds.

Conclusion

[41] For the reasons given, the application is dismissed with costs of RM20,000.